

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

-----  
LULA WILLIAMS, et al., on behalf :  
of themselves and all individuals : Civil Action No.  
similarly situated : 3:17cv461  
vs. :  
BIG PICTURE LOANS, LLC, et al. : October 16, 2017  
-----

COMPLETE TRANSCRIPT OF THE CONFERENCE CALL  
BEFORE THE HONORABLE ROBERT E. PAYNE  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

Kristi C. Kelly, Esquire  
Andrew J. Guzzo, Esquire  
Kelly & Crandall, PLC  
3925 Chain Bridge Road  
Suite 202  
Fairfax, Virginia 22030  
Counsel for the plaintiffs

David N. Anthony, Esquire  
Troutman Sanders, LLP  
Troutman Sanders Building  
1001 Haxall Point  
Richmond, Virginia 23219

Peppy Peterson, RPR  
Official Court Reporter  
United States District Court

1 APPEARANCES: (cont'g)

2 Justin A. Gray, Esquire  
3 Karrie S. Wichtman, Esquire  
4 Rosette, LLP  
5 25344 Red Arrow Highway  
6 Mattawan, Michigan 49071  
7 Counsel for the defendants

8 Richard L. Scheff, Esquire  
9 Montgomery McCracken Walker & Rhoads, LLP  
10 123 South Broad Street  
11 Philadelphia, Pennsylvania 19109  
12 Counsel for defendant Matt Martorello  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



1 like to set some principles for you having read what you  
2 submitted to Judge Young.

3 One, there isn't any reason a party can't be deposed  
4 under Rule 30(b)(1) and Rule 30(b)(6), or a nonparty for that  
5 matter, so long as the depositions are kept distinct and  
6 separate; all right?

7 Second, the *Breakthrough* analysis is not confined, as  
8 the defendants contend, to simply the factors that are outlined  
9 in that particular case, and, in particular, as I think  
10 *Breakthrough* makes quite clear, what happened before is  
11 pertinent to what's happening after the Red Rock transfer. In  
12 particular, the issue involves the intent of the transfer and  
13 how the transfer -- how things were handled before and after  
14 and can, in fact, implicate matters related to the privilege  
15 claims.

16 There is not, as I understand the papers so far, an  
17 effort to pierce the privilege by virtue of the fraud-crime  
18 exception. However, there is a statement or a citation to  
19 *Rambus* and to other authorities about the potential loss of  
20 privilege. And looking at the issues that are being raised,  
21 you need to get this discovery sorted out.

22 Ms. Kelly, what is -- the other thing is, generally  
23 discovery respecting Red Rock, so long as it is related to  
24 issues that have to do with the transfer of ownership, are fair  
25 game for discovery under the allegation of the -- in the

1 complaint which is sufficient, certainly, to survive a 12(b)(6)  
2 motion as to -- and any motion, facial motion for discovery at  
3 this juncture -- I mean for jurisdiction at this juncture.

4 The next issue is privileges. How many privileges --  
5 documents are being claimed, Ms. Kelly?

6 MS. KELLY: Judge, there's been three different  
7 privilege logs that have been served to us. Some of them, it's  
8 very difficult, based on the descriptions, to even identify  
9 what is being withheld.

10 THE COURT: Don't be using terms like "some of them."  
11 You have to be specific. How many privilege logs and who were  
12 they filed by?

13 MS. KELLY: It's all -- this discovery dispute is  
14 solely with the Big Picture Loan defendants.

15 THE COURT: They have filed --

16 MS. KELLY: They have three privilege logs that have  
17 been served. The problem is, they're also withholding  
18 documents on the basis of legislative privilege which, first,  
19 we don't think is appropriate, and, second, they're not logging  
20 it, so we don't even know what's being withheld.

21 There is an objection log where they just identify a  
22 document, and so there's approximately 5,000 documents on an  
23 objection log, and we believe that the documents that they're  
24 withholding for legislative privilege are on the objection log.

25 THE COURT: Excuse me. Is the objection log a

1 privilege objection or objection for something else?

2 MS. KELLY: We've been told that the objection log is  
3 related to Red Rock tribal documents and legislative privilege  
4 documents. Then there's three separate privilege logs.

5 THE COURT: What do you mean privilege logs;  
6 attorney-client privilege, work-product privilege, what?

7 MS. KELLY: It's both attorney-client and  
8 work-product privilege.

9 THE COURT: Why are there three of them?

10 MS. KELLY: Because we allowed them to do a rolling  
11 production so we wouldn't delay the depositions.

12 THE COURT: What's the total number of documents  
13 claimed on the attorney-client privilege and the work-product  
14 privilege claims log?

15 MS. KELLY: There's approximately -- on the second  
16 one there's approximately 20 documents.

17 THE COURT: Excuse me. Mr. Anthony, how many  
18 documents have you claimed privilege to?

19 MR. ANTHONY: Your Honor, I'm going to have to refer  
20 to Ms. Wichtman or Mr. Gray. They know that better than I do,  
21 so let me introduce you to them again.

22 MR. GRAY: Your Honor, I'm pulling the information up  
23 now for the three logs.

24 THE COURT: Who is that?

25 MR. GRAY: Justin Gray, Your Honor. I'm sorry.

1 MS. KELLY: Judge, this is Kristi Kelly. On the  
2 second privilege log, there are 20 documents per page, and it's  
3 a 17-page log. I'm sorry, we're in a deposition right now, so  
4 I don't have it in front of me.

5 THE COURT: So that's 340 documents.

6 MS. KELLY: Then the third log has about 12 documents  
7 on it. It's only two pages.

8 THE COURT: The first one?

9 MS. KELLY: That's the third log, Judge. Sorry.

10 THE COURT: How many in the first one?

11 MR. ANTHONY: Your Honor, this is David Anthony. I'm  
12 just going to walk away for 30 seconds so I can grab my laptop,  
13 and I'll be right back.

14 THE COURT: Sure.

15 MS. WICHTMAN: Your Honor, this is Karrie Wichtman.  
16 There are 80 documents.

17 THE COURT: All right, 80. You are to file -- which  
18 is it that you can't understand the privilege on, Ms. Kelly?

19 MS. KELLY: Judge, the privilege log that I thought  
20 was the least descriptive, it didn't have dates or it didn't  
21 accord with the rules we normally have under *Rambus*, was the  
22 second privilege log.

23 THE COURT: All right. Then your appropriate remedy  
24 is to file a motion to have the privilege claimed as waived and  
25 brief it, because it's an inadequate log if that's your

1 position. In the event that, perhaps, that may be wrong, there  
2 needs to be filed by the defendants a brief explaining each of  
3 the privileges, briefly explain why you claim each, and then  
4 you will have, please, in a notebook, each privileged document,  
5 and in front -- and tabbed with an index, and you will please  
6 describe the privilege claimed and explain in a brief one-page  
7 summary why there is such a claim.

8 Copies of those papers will have to go to the  
9 plaintiff so they can respond to them. We'll see where we go  
10 from there. We'll set a schedule for that. When are you going  
11 to file the privilege -- the attorney-client privilege and  
12 work-product privilege, Ms. Kelly?

13 MS. KELLY: Judge, we can do that in seven days.

14 THE COURT: Give me a date. Do you have a calendar  
15 in front of you?

16 MS. KELLY: It would be October 22nd -- or 23rd.

17 THE COURT: That's a motion to declare the second  
18 privilege log waived; is that what you are talking about?

19 MS. KELLY: That is, Judge, but we'd like the  
20 opportunity to address the other two logs as well. We're at a  
21 deposition right now, so I can't speak that we wouldn't want to  
22 try to attack anything on either of the other two logs.

23 THE COURT: All right, you file all of them  
24 October 23rd. Mr. Anthony, your response?

25 MR. ANTHONY: We'd like at least a week, Judge.



1 THE COURT: That would be the 30th; is that right?

2 MR. ANTHONY: Yes, sir.

3 THE COURT: All right. Your reply, Ms. Kelly?

4 MS. KELLY: If we could have until November 8th.

5 THE COURT: November 8th. These privilege claims  
6 have slowed things down here, and if I find that these  
7 privileges are not well-taken or that the logs are not  
8 sufficient, then I'll entertain motions to assess costs of  
9 additional discovery or whatever at a later time, but I'll  
10 abide the event.

11 Now, as to the filing of what I told you to file, Mr.  
12 Anthony, or whoever is going to address these three privilege  
13 logs, when are you going to file the papers that I told you to  
14 file along with the claimed privilege documents and  
15 explanations properly notebooked and tabbed? When are you  
16 going to do that, and is that Big Picture?

17 MR. ANTHONY: Yes, sir. I'm going to put you on  
18 mute, Judge, just so I can -- actually, how long do you guys  
19 think that we'll need for that? I'm thinking at least a week,  
20 ten days.

21 MR. GRAY: Probably ten considering the volume.

22 MR. ANTHONY: Ten days, Judge? Can we have until  
23 October 27th?

24 THE COURT: 10/27. Your response, Ms. Kelly?

25 MS. KELLY: Can we have until November 8th, please.

1 THE COURT: November 8th. Your reply, Mr. Anthony?

2 MR. ANTHONY: November 18th.

3 THE COURT: You see what you all have done is slowed  
4 down this jurisdictional inquiry sufficiently here that I don't  
5 know how I can deal with it on the schedule. Given the delays  
6 that have been interposed here, I don't see how I can possibly  
7 hold the plaintiffs to the date that I gave them. So I'll have  
8 to reconsider those.

9 As to legislative privilege, what legislative  
10 privilege is somebody asserting? Will somebody tell me that?

11 MS. KELLY: Judge, this is the plaintiffs. We're not  
12 really sure.

13 THE COURT: What is the legislative privilege being  
14 claimed, and who is it being claimed by?

15 MR. GRAY: Your Honor, this is Justin Gray. To the  
16 extent that the discovery requests were broad-reaching and one  
17 of the named parties is the tribal secretary, we asserted  
18 legislative privilege to the named officers in defense of  
19 documents or information they may have in their capacity as a  
20 tribal official.

21 THE COURT: You can't do that. The mere fact that  
22 they have documents in their possession as a tribal official  
23 will get you nowhere. A, you have to establish that there is a  
24 legislative privilege. I don't know that it's ever been held  
25 that there is, but, B, under the traditional law of legislative

1 privilege, you have to establish an entitlement to the  
2 legislative privilege by, inter alia, describing that it  
3 goes -- that what you are holding back went through --  
4 happened, was generated in the process of some legislation. If  
5 you don't do that, you lose. And how many documents have you  
6 claimed legislative privilege as to?

7 MR. GRAY: Your Honor, I'm not sure. This is Justin  
8 Gray again. The documents held by individuals have been  
9 produced. Documents held by the tribe have not, and, right  
10 now, I believe we're looking at three separate documents that  
11 are -- in the first log three documents held or redacted based  
12 on legislative privilege.

13 THE COURT: You file a brief on legislative privilege  
14 as to the documents you are withholding. Do the same process  
15 that is used in the attorney-client privilege, work-product  
16 privilege. You want to follow the same schedule?

17 MR. ANTHONY: Yes, sir.

18 THE COURT: All right. Now, what are these Red Rock  
19 documents that you are withholding?

20 MR. GRAY: Your Honor, this is Justin Gray again, and  
21 this is the issue that we've been working back and forth with  
22 Ms. Kelly about, is the limits to what the jurisdictional  
23 discovery included, and it's our understanding under  
24 *Breakthrough* that the entity asserting tribal sovereign  
25 immunity is the entity to be analyzed under the *Breakthrough*

1 factors, and Red Rock is not --

2 THE COURT: I've read *Breakthrough*. You've read it,  
3 and it doesn't limit -- the *Breakthrough* analysis doesn't limit  
4 discovery to just the factors that were at issue there or just  
5 to the entities as to which the analysis is to be applied,  
6 because documents from a third party, for example, and back and  
7 forth to a third party can be highly relevant in deciding the  
8 fundamental question.

9 And so you can't -- you can't -- as I read your  
10 letter, you don't think you have to produce any Red Rock  
11 documents, and I don't think that's right. And *Breakthrough*  
12 certainly doesn't establish that.

13 MR. GRAY: Your Honor, we, at one point, offered to  
14 go back as far as January 1, 2014, to encompass all the  
15 documents related to the transaction that you just described  
16 earlier in this call. We face a couple other issues, and the  
17 fact that Red Rock --

18 THE COURT: Slow down. You are going too fast.

19 MR. GRAY: Sorry, sir.

20 THE COURT: So you are agreeing to provide all  
21 documents that have any relation to the transaction if they're  
22 in Red Rock's possession; is that what you are saying?

23 MR. GRAY: Your Honor, yes, the documents would be in  
24 Big Picture's possession at this point because Red Rock is a  
25 dissolved company.

1 THE COURT: All right. So they transferred  
2 documents, and you can identify those; is that right?

3 MR. GRAY: Yes. We offered a January 1, 2014, cutoff  
4 date for those documents.

5 THE COURT: Why? Why is that date appropriate?

6 MR. GRAY: That sort of encompasses the beginning of  
7 the transaction that's at issue.

8 THE COURT: How do you define the beginning of the  
9 transaction?

10 MR. GRAY: Essentially our clients begin planning and  
11 looking to create and establish Big Picture and Ascension on or  
12 around that time or shortly thereafter.

13 THE COURT: Well, Ms. Kelly, what's wrong with that  
14 time limitation?

15 MS. KELLY: Judge, what we think is important for  
16 *Breakthrough* is why they decided to potentially take all of the  
17 Red Rock assets and purchase them, and we think we need farther  
18 back because the financial relationship is really important and  
19 relevant.

20 THE COURT: Why do you need further back? What you  
21 need, it seems to me, is from the time consideration of the  
22 deal began between the parties or by Red Rock. What date would  
23 you think that would be? And I'm not talking about formally  
24 structuring the paperwork. I'm talking about when did Red Rock  
25 decide it would be a good idea to divest itself and make the

1 transfer to Big Picture, and why was that done. All of that,  
2 it seems to me, is open to discovery if it was -- no matter  
3 when it was. Mr. Gray, do you disagree with that?

4 MR. GRAY: Your Honor, not entirely, but based on the  
5 *Breakthrough* factors and looking at Big Picture today, every  
6 case that has gone through *Breakthrough* has considered -- every  
7 case that has gone through *Breakthrough* has considered --

8 THE COURT: You are running too fast, and I want you  
9 to stop right now. You do consider the entity asserting  
10 immunity, but you cannot isolate the entity claiming the  
11 immunity under *Breakthrough* and avoid producing all the  
12 documents that led up to the transfer.

13 You can't do that, and *Breakthrough* doesn't hold it,  
14 and nothing that I know of does. And if you have a case that  
15 holds it, I hold otherwise because that's just not what the law  
16 is, as I understand it. So when did Red Rock begin thinking  
17 about and analyzing and deciding whether or not to make this  
18 transfer and -- when did that happen?

19 MS. KELLY: Judge, this is Kristi Kelly for the  
20 plaintiff. It's our position that it wasn't Red Rock or the  
21 tribe who decided it, because the effect of the transition from  
22 Red Rock --

23 THE COURT: You are talking too much. You are  
24 talking too much. Stop there and tell me who it is that did  
25 decide it.

1 MS. KELLY: I believe we believe it was Mr.  
2 Martorello, the other defendant in this case, because there was  
3 regulatory crackdown on payday lending businesses --

4 THE COURT: Yes, Ms. Kelly, I read your paper and I'm  
5 familiar with that. But there had to be a transfer, didn't  
6 there? There had to be contemplation of it by Red Rock in  
7 addition to Mr. Martorello; right?

8 MS. KELLY: Yes, there was, Judge.

9 THE COURT: Of course, there had to be. Red Rock was  
10 a corporate entity, wasn't it?

11 MS. KELLY: Correct.

12 THE COURT: And at some point in time, it and its  
13 people, in conjunction with Martorello, or separately from him,  
14 began contemplating the transfer that you say is the sham. And  
15 when did, in your mind, that contemplation by either Red Rock  
16 or Martorello begin?

17 MS. KELLY: It would have been in early 2014 based on  
18 the documents we've seen.

19 THE COURT: Then why don't you limit your Red Rock  
20 request to January 1, 2014, and then if you find, in looking at  
21 those documents, something that requires a further reach-back,  
22 then you can file a supplement.

23 MS. KELLY: That's fine, Judge. The only issue that  
24 we could foresee with that is that the lawyers, the general  
25 counsel for Big Picture, handled the majority of the

1 correspondences, and so the Big Picture employees and tribal  
2 officials may not be on any of those correspondences. That  
3 would be our only concern.

4 THE COURT: If they're handled by the general  
5 counsel, you must -- they're going to identify them, and if  
6 they haven't claimed them as privilege, then they're not  
7 privileged. If they have claimed them as privileged, they'll  
8 be on the privilege log; isn't that correct, Mr. Anthony or Mr.  
9 Gray?

10 MR. GRAY: Yes, Your Honor.

11 THE COURT: All right. Then we can deal with that.  
12 To the extent that any privilege document deals with the  
13 contemplation of the transfer that's at issue, you need to  
14 separately identify that for Ms. Kelly and for the Court so we  
15 understand that scope; all right?

16 MR. ANTHONY: Yes, sir.

17 THE COURT: Now, where does that leave us? We've  
18 taken care of the legislative privilege, the Red Rock  
19 documents, the motion to waive by the plaintiffs, and all  
20 privilege claims briefed, et cetera, et cetera, by the  
21 defendants, Big Picture, or whoever is claiming the privilege.  
22 Does Judge Lauck have the *Gibbs* case?

23 MS. KELLY: That's correct, Judge.

24 THE COURT: Where does that case stand?

25 MS. KELLY: We have briefed the motions to dismiss,



1 and we're filing our reply brief for the jurisdictional  
2 discovery requests we made --

3 MR. ANTHONY: Judge, Judge Lauck did not order  
4 jurisdictional discovery. That issue in the scope of it is  
5 being briefed.

6 MS. KELLY: Correct. But we're moving forward with  
7 the non-tribal lending entities briefing, the 12(b)(6) and  
8 various arbitration motions. There are two separate cases,  
9 because the defendants in the first case, the non-tribal  
10 lending entities, also transferred back control to the tribal  
11 lending entities after the payday lending breakdown.

12 So in order to cease the lending in Virginia, we had  
13 to name the tribal lending entities, and that is the case where  
14 we are -- we have briefed the jurisdictional discovery issue.

15 THE COURT: All right. Okay. Now, does that take  
16 care of the discovery questions that you all have, or do you  
17 have any left to go to Judge Young?

18 MS. KELLY: Judge, for the plaintiffs, we also have  
19 the issue of redacted documents that were -- there were  
20 probably close to at least one-third of the production was  
21 redacted.

22 MR. GRAY: We can confirm that with your decisions on  
23 what counts as documents responsive to the transfer, we'll be  
24 able to sort those and produce them now that we understand the  
25 Court's position.

1 THE COURT: So the redactions will be eliminated; is  
2 that right?

3 MS. WICHTMAN: As it relates to Red Rock and Duck  
4 Creek.

5 THE COURT: Who is that?

6 MS. WICHTMAN: Karrie Wichtman, Your Honor.

7 THE COURT: Why else did you redact them, Ms.  
8 Wichtman?

9 MS. WICHTMAN: There were broad requests for  
10 third-party service providers, and at this stage in  
11 jurisdictional discovery, the vendors and capital sources of  
12 Big Picture loans we didn't feel -- we stood on our objections  
13 related to those.

14 THE COURT: Ms. Kelly, why do you need the vendors  
15 and capital providers?

16 MS. KELLY: Well, the capital providers is about the  
17 financing and who gets what and who is really in control of the  
18 lending operation. And we believe that's part of the last  
19 *Breakthrough* factors. So to the extent that the tribe is not  
20 funding the loans and the loans are immediately being sold to  
21 third parties and they're getting returns on the investment  
22 that the tribe is not getting, we think that is entirely  
23 relevant to the last *Breakthrough* factor.

24 THE COURT: That's the capital sources issue. How  
25 about the vendors?

1 MS. KELLY: For the vendors, that is not as  
2 necessary. I will concede that because of Mr. Martorello's  
3 production we've been able to identify a lot of them because he  
4 produces the documents un-redacted.

5 THE COURT: All right. You withdraw your request for  
6 the vendors at this time.

7 MS. KELLY: We -- I don't think we ever really  
8 specifically asked for that, but we will agree they don't need  
9 to un-redact the vendor agreement.

10 THE COURT: The capital services, why isn't -- Ms.  
11 Wichtman or Mr. Gray or Mr. Anthony, why are the capital  
12 sources leading up to and what the capital sources people were  
13 told about what they were going to invest to, what the  
14 structure was to be, the considerations of the structure, why  
15 isn't all of that available to the plaintiffs where they allege  
16 what they allege here?

17 MR. GRAY: Your Honor, at no point did we disclose  
18 there were the capital sources, and, at this point, through  
19 production provided by Matt Martorello, all the notes and  
20 documents have been provided. So I think we're in a position  
21 right now where we're talking form over substance of what Ms.  
22 Kelly actually needs.

23 THE COURT: Then you provide everything about the  
24 capital sources that you have, even if it's the same documents  
25 that Martorello provided, because you may have just to show

1 that you got them or had them, and if there are notes on them,  
2 then they're different documents anyway, because I don't see  
3 any reason why the financial structure of this transaction is  
4 not open to discovery in terms of assessing the jurisdictional  
5 issue, and I think Ms. Kelly is right that it does implicate  
6 *Breakthrough*.

7 MS. WICHTMAN: Your Honor, this is Karrie Wichtman.  
8 I would just clarify that we have not -- we have withheld  
9 capital source related to the financing of the transaction, but  
10 we've also withheld capital sources related to the operation of  
11 the business, and in our understanding of your September 1st  
12 order, it was about jurisdiction, not necessarily operation of  
13 the business but actually the structure of the business. So  
14 that's why we withheld the capital sources related to the  
15 operation of the business. We certainly --

16 THE COURT: Why do you need the operation of the  
17 business, Ms. Kelly?

18 MS. KELLY: Judge, so the operation of the business  
19 is whether the tribe is in control. So in one of the  
20 agreements that we've seen for lending to the tribes to fund  
21 this business, the lender exerts control over basic day-to-day  
22 functions, and the capital agreements would also show what  
23 return that lender is entitled to get. And, in some  
24 situations, they may be receiving more than the tribe.

25 It may also explain the structure, whether they

1 purchased loans that are immediately funded. Any number of  
2 things could go toward the *Breakthrough* factors, but we don't  
3 have the benefit of seeing those, but we think they're  
4 definitely relevant to this inquiry.

5 THE COURT: Ms. Wichtman, anything else to say?

6 MS. WICHTMAN: I would say we provided information  
7 related to the capital sources that are used by the business in  
8 our briefs and in the interrogatory responses to name them  
9 generally, and specific information related to those capital  
10 sources and their names are not relevant to jurisdiction and  
11 the *Breakthrough* factors.

12 THE COURT: All right, that objection is overruled.  
13 All documents relating to the structure and operation of the  
14 business are certainly pertinent to understanding who it is  
15 that's driving the boat, who it is that is in control, whether  
16 or not the tribe really has any say-so in any of the matters or  
17 is just being used as a passthrough.

18 There is no better way to assess that than to assess  
19 the documents by which the financial people structured the  
20 arrangement and by which operations are conducted. It seems to  
21 me that -- that's not just *Breakthrough*. That has to do with  
22 any transaction of any kind that is alleged to be a sham or a  
23 charade, because the truth then comes out with respect to how  
24 it is that the operation is conducted. And if the business  
25 operations are all squared away, for example, and the tribe

1 gets X and the other person gets Y and that's pursuant to the  
2 structure, it shows what role the tribe plays in it, then  
3 that's all pertinent to the discovery -- to the jurisdictional  
4 issue just as is the fact that it's, as Ms. Kelly says, she  
5 thinks it is. So that objection is overruled. There was a  
6 complaint about Ms. Kelly using subpoenas in addition to  
7 document requests. What's the objection to that?

8 MR. GRAY: Your Honor, we didn't believe the  
9 jurisdictional order was all-encompassing of running avenues  
10 and essentially a fishing expedition to anybody and everybody  
11 she found the name of in a document, and we believe that the  
12 purpose of those is essentially --

13 THE COURT: Mr. Gray, you're going to have to take  
14 lessons in slowing down, because neither the court reporter nor  
15 I can follow what you are saying.

16 MR. GRAY: I apologize, Your Honor.

17 THE COURT: And you need to identify yourself when  
18 you are talking. So your position, Mr. Gray, is that the order  
19 I issued restricted her to the particular things that were  
20 mentioned therein; is that what you are saying by way of --

21 MR. GRAY: We believe it did, Your Honor. It limited  
22 it to the jurisdiction of Big Picture as it claims are its  
23 mentality status, and all the information she is seeking in  
24 these third parties has likely been supplied already, or will  
25 be based on today's decision, and we believe the purpose is

1 essentially to frustrate the business while it operates today  
2 as opposed to litigate the dispute.

3 THE COURT: Ms. Kelly?

4 MS. KELLY: Thank you, Judge. We issued either four  
5 or five subpoenas, and the majority of them, I believe except  
6 for two, were bank subpoenas because they were not giving us  
7 the information, and we wanted to meet our deadline.

8 THE COURT: Who is "they" in that sentence?

9 MS. KELLY: The Big Picture Loan defendants. And so  
10 through that, we learned that there are controls on their bank  
11 accounts where the Big Picture defendants can't even sign for  
12 wires or do -- control their own bank accounts, and so that led  
13 us to do more discovery. But the purpose of the subpoenas was  
14 to meet our deadlines for briefing so that we would have all  
15 the information.

16 THE COURT: All right. Well, the order doesn't limit  
17 the kind of discovery that is available to any party. It did  
18 deal with the kind of discovery that you all were talking about  
19 at the conference where we set up this arrangement and  
20 schedule, but it's perfectly all right to use any procedural  
21 vehicle authorized by the Federal Rules of Civil Procedure in  
22 pursuit of the discovery about a jurisdictional issue, and I  
23 don't see anything that Ms. Kelly has done or said is intended  
24 to interfere with the operation of the business, and so that  
25 objection is overruled, and, in any event, it is the

1 responsibility of any party receiving a subpoena to raise an  
2 objection to it and -- or seek protection from it. Has anybody  
3 done that that you've subpoenaed, Ms. Kelly?

4 MS. KELLY: I don't think any of these -- no, not  
5 that I'm aware of.

6 THE COURT: If they haven't, then they have to comply  
7 with them, and you get to look at them. I don't see that you  
8 have a whole lot of say in it, Mr. Gray, except to the extent  
9 you had a contention that it may have been interfering with  
10 business operations, and, quite frankly, in over 50-something  
11 years of practicing law, I have never seen that actually  
12 happen, and there's nothing that you've shown in anything that  
13 I've seen that would suggest that it is interfering with your  
14 business operations. It seems to me to be rather much an  
15 obstructionist objection, so it's overruled. Is there  
16 anything -- you need to leave with Judge Young now, or have you  
17 exhausted everything?

18 MS. KELLY: The only other issue, Judge -- this is  
19 Kristi Kelly. The only other issue was the discovery that Big  
20 Picture defendants propounded on the different plaintiffs. We  
21 have addressed that with the defendants, and we believe it's  
22 completely outside the scope of the order.

23 It asks for things like when our plaintiffs went on  
24 vacation, all their income for the past six years, and I don't  
25 know how anything dealing with the specific plaintiffs could be



1 relative to the *Breakthrough* factors.

2 Our plaintiffs are low-income consumers, and the  
3 discovery, in my opinion, was just to harass and belittle the  
4 plaintiffs.

5 THE COURT: All right, thank you. Mr. Gray, why do  
6 you need information like that on the discovery issues?

7 MR. GRAY: Yes, Your Honor, this is Justin Gray. The  
8 complaint makes allegations not only against Big Picture and  
9 Ascension but also against LVD officers, and it also attacks  
10 the fundamental integrity of the loan agreements.

11 Our jurisdictional discovery is propounded on behalf  
12 of the LVD officers, the four named Tribal Council members, and  
13 it seeks a basis, first of all, to claim that they're not  
14 immune from these allegations.

15 THE COURT: Who is not immune?

16 MR. GRAY: The complaint alleges that these LVD  
17 officers are not immune because they have violated federal law.

18 THE COURT: What is it that calls into analysis in  
19 that process, the jurisdictional issue when the people went on  
20 vacation and how much money they make, the plaintiffs? How  
21 does that work?

22 MR. GRAY: Your Honor, the complaint goes back as far  
23 as 2009 on certain instances, and we believe we're entitled to  
24 find out exactly what information plaintiffs had going that far  
25 back to support claims that my clients are not immune as

1 entities or officials of the tribe.

2 THE COURT: I didn't ask you that. I asked you how  
3 it is that the vacation and income of the individual plaintiffs  
4 applied here.

5 MR. GRAY: Your Honor, we'd like to be able to  
6 determine when and where these plaintiffs were when they used  
7 our client's service, when and where they were when they took  
8 the loan, when and where they were when they spent the loan.

9 THE COURT: All right, Mr. Gray, excuse me. A, that  
10 isn't responsive to the question I asked you. B, whether you  
11 would like to or not is a prurient interest and is not  
12 necessarily an interest related to valid discovery, and I  
13 didn't ask my question right or I wouldn't have gotten those  
14 answers.

15 So my question is, what relevance to the  
16 jurisdictional issue for anybody does a plaintiff's vacation  
17 schedule or income have? Can you help me with that?

18 MR. GRAY: Yes, Your Honor, and I'll be more  
19 succinct. The discovery we propounded had two of those issues  
20 that Ms. Kelly had taken path to. We have yet to receive their  
21 objections and will work with them on some of the limits to  
22 these, but primarily they allege these loans are procured by  
23 fraud and that the choice-of-law provision is faulty, and we  
24 believe that under the theory of tribal exhaustion, they're  
25 relevant to tribal sovereignty and tribal immunity.

1 THE COURT: How?

2 MR. GRAY: Because the forum-selection provisions and  
3 the choice-of-law provisions are duly authorized, valid, and  
4 were not procured by fraud, and to the extent that the  
5 allegations say that my clients have a faulty loan agreement, a  
6 sham procedure, we believe we're able to investigate that.

7 The procedure for a dispute is a tribal court  
8 mechanism. The doctrine of tribal exhaustion should prevail  
9 under the circumstances. If Ms. Kelly or the plaintiffs have  
10 evidence that this is somehow a sham, we'd like to be able to  
11 review that. This is not a situation --

12 THE COURT: So how does the plaintiff's vacation  
13 schedule show that?

14 MR. GRAY: Like I said, Your Honor, perhaps some are  
15 reaching. The bulk are not.

16 THE COURT: I'll tell you what. Because you reached  
17 and went too far on at least three of them, all your discovery  
18 requests are stricken, and you may posit discovery requests  
19 that confine to the issues you are talking about in such a way  
20 as you can demonstrate when we next talk about it.

21 As of now, all of your discovery requests to the  
22 plaintiff are stricken, and you start all over again. That's  
23 what happens when you go too far.

24 MR. GRAY: Your Honor, are we entitled to -- this is  
25 Justin Gray again. Are we entitled to take depositions of the

1 plaintiffs?

2 THE COURT: Yes, you are.

3 MR. GRAY: Your Honor, this is Justin Gray again. If  
4 Ms. Kelly is through, we have a couple issues we'd like to  
5 present to the Court as well.

6 THE COURT: I don't know what you have left to  
7 present given that your discoveries have been stricken. What  
8 is your issue?

9 MR. GRAY: Your Honor, we'd like to look at a  
10 reasonable limit to the discovery, and I'd like to back up one  
11 second on what we have originally produced here. We broke --

12 THE COURT: Mr. Gray, excuse me. I've read all that.

13 MR. GRAY: Then the short and sweet, Your Honor, is  
14 that we're at \$140,000 deep, and we have documents that we now  
15 need to go back through again. The tier two and tier three  
16 categories are --

17 THE COURT: Slow down.

18 MR. GRAY: The tier two and tier three production are  
19 largely going to be duplicative at a cost of 700-plus thousand  
20 dollars. We believe everything that the Court has instructed  
21 we turn over today will be encompassed in tier one production,  
22 especially after we return to it based on your instructions,  
23 and before our clients get into \$700,000 of additional expense  
24 at probably five weeks of realistic time, we think that the  
25 discovery should be ended with tier one after we re-review this

1 collection based on today's instructions.

2 THE COURT: My suggestion is that you file a detailed  
3 brief respecting what you're talking about with respect to tier  
4 one, tier two, and tier three, and my general approach -- this  
5 is a case -- what is at stake here, Ms. Kelly? How much can  
6 the ad damnum be or the jury award be?

7 MS. KELLY: Judge, the defendants have not told us  
8 the amount of money that's at stake in Virginia, but in the  
9 *Gibbs* case, we know that they took \$93 million from Virginia  
10 residents, and so we understand that Big Picture is a bit  
11 smaller of an entity, so I would estimate that -- I mean, this  
12 is just a really off-the-cuff guess, but approximately  
13 \$30 million would be at stake --

14 THE COURT: Excuse me. Mr. Gray, how much do you  
15 think is at stake assuming she wins?

16 MR. GRAY: Your Honor, our best estimate at this time  
17 is less than \$5 million from Virginia residents.

18 MS. KELLY: And, Judge, this is Kristi Kelly, but any  
19 of that money would be trebled, and as to their request about  
20 tier one, we already agreed to that, to limit it to tier one  
21 discovery in our meet-and-confer. But we reserved the right to  
22 have them search two other custodians after we reviewed their  
23 most recent production.

24 The problem, though, is that half of their production  
25 of 10,000 pages so far was redacted, and they withheld

1 approximately 5,000 documents. So we are fine working with  
2 them on the scope of the discovery, and we're not trying to be  
3 punitive. I already agreed to that.

4 THE COURT: All right. I think that is made clear.  
5 I think your request for a limit on what you are calling tier  
6 one, two tier, and tier three is premature until you do what  
7 you're required to do, Mr. Gray, by what I've directed you to  
8 do today, and then Ms. Kelly looks at it and then you all can  
9 talk about it again, and you are free to raise that issue at a  
10 later time.

11 As of this time, looking at the allegations of the  
12 complaint, the information that has been provided in the  
13 briefing and the papers on discovery and an assessment of what  
14 counsel have said, the discovery sought so far has been -- is  
15 proportional and is certainly appropriate. So I don't see any  
16 way that at this juncture it's appropriate for the Court to  
17 impose further stricture. What's the next point you've got,  
18 Mr. Gray?

19 MR. GRAY: Yes, Your Honor, I'm just checking notes.  
20 We'd also like to ask for a limit on plaintiffs' deposition to  
21 the named parties. Again, this also all goes to the scope of  
22 what is necessary to evaluate Big Picture as it operates today,  
23 and we provided five times more documents than every case ever  
24 to analyze Big Picture at a federal level, and we have produced  
25 more documents in our initial motions than any motion has ever

1 done before.

2 We have provided depositions starting today and  
3 tomorrow and then of the other named defendants, and we think  
4 anything else is excessive for what the Court will need to  
5 evaluate the status of Big Picture and whether or not the named  
6 tribal officials are immune.

7 THE COURT: Ms. Kelly? What kind of restrictions do  
8 you want? I still don't understand it.

9 MR. GRAY: We're asking that the depositions  
10 essentially be limited, Your Honor, to the parties, to the  
11 named parties.

12 THE COURT: Oh, okay. What is your position, Ms.  
13 Kelly?

14 MS. KELLY: Judge, we've already agreed to that. We  
15 have two depositions noticed for two of the executives of  
16 Ascension, but we said after we reviewed the production, we can  
17 likely withdraw those.

18 THE COURT: You are limited in your deposition to the  
19 parties, and you are waiting to see what happens, and so the  
20 request is premature, but as a practical matter, there's no  
21 reason to limit anybody's depositions to just the parties where  
22 some nonparty may have pertinent information.

23 Let us suppose, for example, that one of the lenders'  
24 documents shows facts that reasonably show that the tribe  
25 doesn't have any real interest in this. If they want to take a

1 deposition of that person to confirm what the operating  
2 situation is and what the loan situation is, that's perfectly  
3 all right.

4 I don't know where you came to this nonparty/party  
5 distinction in the first place, Mr. Gray, but I don't think  
6 it's appropriate. But in any event, it's premature, and she  
7 can -- you can raise it after she decides to do whatever she's  
8 going to do with the two nonparty depositions that she's  
9 noticed.

10 Is there anything else -- I'll tell Judge Young that  
11 this matter is moot now based on what we talked about today.

12 MS. KELLY: Judge, for the plaintiff, that's correct.  
13 We really appreciate your taking the time to handle this.

14 THE COURT: If I hadn't had a free day and Judge  
15 Young wasn't tied up in a settlement conference, I wouldn't  
16 have done it, but it needs to get done because of the schedule  
17 we're on. How about you, Mr. Gray; is that okay?

18 MR. GRAY: Your Honor, I believe we've addressed all  
19 the issues other than revising the calendar going forward with  
20 this. We have briefing deadlines on these other topics right  
21 now, but looking at where we are now, I believe plaintiffs'  
22 brief is due November 3.

23 THE COURT: Ms. Kelly, you can't get your brief done  
24 and get everything done by this time given the schedule that  
25 we've got, so my suggestion is that the two of you sit down



1 after you assess the documents as they come in, you get some  
2 things under control, and we'll set a new date for your  
3 response, Ms. Kelly, and a new date for your reply, Mr. Gray.  
4 And, in the meantime, that provision of the order will be held  
5 in suspension and not apply.

6 MS. KELLY: Thank you, Judge.

7 THE COURT: Now go back to your depositions and see  
8 what you can do. What have you done about trying to settle  
9 this case, folks? Have you had a discussion with any of the  
10 magistrate judges?

11 MS. KELLY: Judge, this is Kristi Kelly. Mr. Anthony  
12 and I have discussed broad ideas, and we've talked about other  
13 settlements in other cases, but I just don't know that we're  
14 there.

15 MR. ANTHONY: There has not been, Judge -- this is  
16 David Anthony -- conversations yet with a magistrate judge.

17 THE COURT: Is the magistrate judge assigned? I just  
18 haven't looked at the docket.

19 MR. ANTHONY: I seem to remember yes, but I'm not  
20 sure, and I guess since Judge Young was involved in the  
21 discovery, that would be Judge Novak, but I can't remember,  
22 Judge. I think yes, but I'm not sure.

23 THE COURT: Actually now I remember. Ms. Hooper told  
24 me I did assign it to Judge Young, and I didn't see any problem  
25 with him being involved in the discovery as well as settlement,

1 so I'll double-check that, but you all need to sit down and  
2 sort through this case.

3 MS. KELLY: Thank you, Judge.

4 THE COURT: All right. And you need to get -- do you  
5 all need the transcript so you can make sure you understand you  
6 comply with everything; is that correct?

7 MS. KELLY: Yes, plaintiffs would like to order the  
8 transcript.

9 MR. ANTHONY: This is David Anthony on behalf of  
10 defendants, yes, sir.

11 THE COURT: Both of you have it. Thank you.

12 MR. ANTHONY: Thank you.

13 THE COURT: Bye-bye.

14

15 (End of proceedings.)

16

17

18 I certify that the foregoing is a correct transcript  
19 from the record of proceedings in the above-entitled matter.

20

21

22 /s/  
23 P. E. Peterson, RPR

\_\_\_\_\_  
Date

24

25